

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ROBERT P. BROWN,)	
Petitioner)	
)	
v.)	Civ. No. 03-045-P-C
)	
STATE OF MAINE,)	
Respondent)	
)	

RECOMMENDED DECISION ON 28 U.S.C. § 2254 MOTION

Petitioner Robert P. Brown brought this action pursuant to 28 U.S.C. § 2254 seeking to challenge his 1998 conviction for Class D Assault. Brown’s sentence of six months in the county jail with all but four days suspended, to be followed by one-year of probation, expired on April 5, 2000. I now recommend that the court summarily **DISMISS** this petition because Brown has failed to satisfy the “in custody” requirement of § 2254(a).

Background

On May 21, 1998, Brown was convicted of Class D Assault in the Superior Court at York County, Maine. The sentence imposed -- six months in the county jail with all but four days suspended, followed by one year of probation -- was stayed, pending appeal. On April 2, 1999, the Maine Supreme Judicial Court, sitting as the Law Court, affirmed the conviction and the mandate entered on the Superior Court’s docket on April 5, 1999. Brown served his four days in jail from April 8, 1999 to April 11, 1999. He completed his one year period of probation on April 5, 2000.

On July 23, 1999, while still on probation, Brown filed a state post-conviction petition challenging the conviction. Because Brown was then on probation he met the state's own "in custody" requirement. The Superior Court resolved the state post-conviction by denying the petition on April 26, 2002, and on June 12, 2002, the Law Court issued an order denying Brown's request for a certificate of probable cause to appeal that determination. Brown filed this petition on February 19, 2003, claiming that he had been denied the effective assistance of counsel at the time of his conviction and that he had also been denied equal protection under the law.

Following my initial review of the petition, I ordered that the state file a brevis response, indicating its position vis-à-vis whether or not Brown met the "in custody" requirement of § 2254(a). (Docket No. 2.) The State did so, moving to summarily dismiss the petition because Brown was no longer in custody. Brown does not dispute the State's chronological recitation, but points to a Maine Department of Corrections Memorandum stating that Brown failed to satisfy the conditions of his probation. Brown maintains there is a theoretical possibility that the state could attempt to enforce those conditions after the actual period of probation has expired. The State maintains that it does not ever intend to bring any sort of enforcement proceeding against Brown based upon his expired probation and indeed the probation officer believes he has absolutely no authority to do so.

Discussion

Brown's sentence had fully expired at the time he filed this federal habeas proceeding. The law with respect to potential collateral consequences and the in custody requirement is clear:

The question presented by this case is whether a habeas petitioner remains "in custody" under a conviction after the sentence imposed for it has fully expired, merely because of the possibility that the prior conviction will be used to enhance the sentences imposed for any subsequent crimes of which he is convicted. We hold that he does not. While we have very liberally construed the "in custody" requirement for purposes of federal habeas, we have never extended it to the situation where a habeas petitioner suffers no present restraint from a conviction.

Maleng v. Cook, 490 U.S. 488, 492 (1989). Even before Maleng was decided, the law in the First Circuit provided that after the expiration of the probationary period, federal habeas corpus relief was unavailable. Tinder v. Paula, 725 F.2d 801, 803 (1st Cir. 1984) (“[A] sentence that has been fully served does not satisfy the custody requirement of the habeas statute, despite the collateral consequences that generally attend a criminal conviction.”). Brown’s petition is therefore subject to summary dismissal.¹

Conclusion

Based upon the foregoing, I recommend that the court **GRANT** the State’s motion and summarily dismiss the pending petition.

NOTICE

A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

¹ The record in this case suggests that Brown’s Assault conviction may have been based upon a crime of domestic violence. I do not question but that such a conviction might well carry serious potential collateral consequences. In United States v. Akins, 276 F.3d 1141 (9th Cir. 2002) the Ninth Circuit noted that potential for federal prosecution under 18 U.S.C. § 922(g)(9) proved how severe the non-custodial collateral consequences might be. Id. at 1148; see also id. 1148 n.3 (reflecting that an innocent defendant faced with a charge of domestic assault might be unaware of the potential consequence of the conviction and might plea to a misdemeanor for time served simply to move on). At least in this case the docket entries clearly reflect that a jury trial was held and that Brown was represented by counsel at the time of his conviction.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

April 28, 2003

Margaret J. Kravchuk
U.S. Magistrate Judge

HABEAS, ADMIN, BANGOR

**U.S. District Court
District of Maine (Portland)
CIVIL DOCKET FOR CASE #: 2:03-cv-00045-GC
Internal Use Only**

BROWN v. MAINE DEPARTMENT OF
CORRECTIONS

Assigned to: JUDGE GENE CARTER

Referred to: MAG. JUDGE MARGARET J.
KRAVCHUK

Demand: \$

Lead Docket: None

Related Cases: None

Case in other court: None

Cause: 28:2254 Petition for Writ of Habeas Corpus
(State)

Date Filed: 02/19/03

Jury Demand: None

Nature of Suit: 530 Habeas Corpus
(General)

Jurisdiction: Federal Question

Plaintiff

ROBERT P BROWN

represented by **ROBERT P BROWN**
112 SCHOOL ST
KENNEBUNKPORT, ME 04046
PRO SE

V.

Defendant

**MAINE DEPARTMENT OF
CORRECTIONS**

represented by **DONALD W. MACOMBER**
ASSISTANT ATTORNEY
GENERAL
STATE HOUSE STATION 6
AUGUSTA, ME 04333-0006
626-8800
LEAD ATTORNEY
ATTORNEY TO BE NOTICED